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No. 84-463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SPIEGEL, INC.,

Petitioner,

vs.

ALDON ACCESSORIES LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, ALDON ACCESSORIES LTD., respectfully submits this brief in opposition to the petition of SPIEGEL, INC. seeking a writ of certiorari and respectfully requests that such petition be denied with appropriate costs.

Questions Presented for Review:

The petitioner's questions are improperly based upon factual contentions and inferences drawn entirely in petitioner's favor even though there were many sharp issues of fact determined in a jury trial demanded by petitioner.

The petitioner, by disregarding all contrary facts, assumes in a conclusory manner that any artist who partially participated together with the plaintiff had to be an independent contractor.

The Circuit Court of Appeals reviewed all of the disputed factual issues and clearly held that the respondent's president, Arthur Ginsberg, both actively created and directed the creation of both the porcelain and brass statuettes in issue and that the creation of the expression was not left solely to an artist or sculptor. The Circuit Court stated that the question of supervision and

direction was submitted to the jury and that the finding of an employer-employee relationship was supported by ample evidence.

That portion of the petitioner's questions involving legal contentions are similarly improperly based upon a proposed bill seeking to amend certain sections of the Copyright Law which, although introduced to the Senate in November 1983, has been merely assigned to the Judiciary Committee. Although petitioner assures this Court that the proposed bill amending the Copyright Law regarding work-for-hire will be reintroduced in 1985, there is no contention that this proposed bill will in fact become law nor is the proposed amendment on its face relevant to the issues at hand.

STATEMENT OF THE CASE

It is only by disregarding the petitioner's own cases, which the Court of Appeals for the Second Circuit dealt with in detail, that the petitioner is able to contend that this is a case of first impression.

The petitioner further argues on page 17 of its petition that the Court of Appeals may have misunderstood its arguments and authorities.

The petitioner's conclusion that certain Japanese and Taiwanese artisans had to be "independent contractors" completely disregards and misstates the facts and evidence submitted in this case. All facts and contentions were carefully reviewed by the Court below as well as the Circuit Court. Only by disregarding the evidence can the petitioner contend that the plaintiff was either ignorant or deceitful regarding the facts

surrounding the genesis of the products in question.

The petitioner, by setting forth limited and partial quotations from the testimony, follows the same pattern it sought to establish in the Circuit Court by the petitioner.

> "Q. Did you get in there with a pencil and paper and make them or did he make them?
>
> A. No, I didn't use a pencil and paper. I didn't need to. (JA 411)" (P.12, Pet. brief)

The defendant petitioner omits testimony that the plaintiff participated directly in sketches as well as the refinement of the rough clay pieces involving the portion of legs, proportions of the body.

The petitioner, disregarding the detailed review of the evidence by the Circuit Court of Appeals, brazenly contends that the testimony regarding the creation, direction and supervision of

the statuettes in issue is not in material dispute and on page 13 the petitioner states "Consequently, for purpose of this petition, there are no facts in dispute."

The Circuit Court of Appeals' opinion quotes verbatim in part a letter written by Arthur Ginsberg who conceived of a novel line of statuettes depicting mythological creatures, including a unicorn. This unicorn contained mostly the features of a horse rather than a unicorn. The letter first describing the concept gave a full description of the unicorn which represented the actual final product in words and indicated that prior sketches had been particpated in by Arthur Ginsberg prior to any model ever being created.

The Circuit Court's opinion, pages 4708-4709 (A4-A-5) sets forth in detail the exact participation by Arthur Ginsberg together with artists in preparing

both sketches which was followed by clay models actively supervised and directed step by step by the plaintiff.

The plaintiff further proved as detailed by the Circuit Court that the defendant's buyer had shopped the plaintiff, requested and received samples as well as the Aldon catalogue all of which clearly indicated that plaintiff's items were copyrighted. The defendant petitioner concedes that its buyer was aware that the unicorn was a very popular item at the time she first shopped and received samples. The defendant later purchased identical replicas of plaintiff's statuettes.

The Circuit Court (at page 4717 of its opinion) (A-13) stated the following:

> "Our conclusion that the judge's charge was not incorrect does not produce a result at odds with the Congressional intent. There was evidence in this case that Ginsberg did much more than communicate a general concept or idea

> to the Japanese and Taiwanese artists and artisans, leaving creation of the expression solely to them. There was evidence that Ginsberg actively supervised and directed the creation of both the porcelain and brass statuetts. While he did not physically wield the sketching pen and sculpting tools, he stood over the artists and artisans at critical stages of the process, telling them exactly what to do. He was, in a very real sense, the artistic creator. Citing Florabelle Flowers Inc. v. Joseph Markovitz, Inc., 296 F. Supp. 304(S..N.Y.1968), Spiegel argues that, as in that case, Ginsberg had no more than a general conception and the creation was done by the artists and artisans. In Florabelle,the judge was acting as fact-finder on a motion for a preliminary injunction and there was virtually no evidence of participation by the plaintiff in the physical creation of the artificial flower in dispute. Here, the question of supervision and direction by Ginsberg was submitted to the jury, and their finding, implicit in the verdict, of an employer-employee relationship is supported by ample evidence."

The petitioner contends that the writ be granted since the decision of the Circuit Court subverts the intent of the new Copyright Law. The petitioner, by

the use of a crystal ball, submits to this Court the Cochran Bill, S.2138, in an attempt to bolster its interpretation of the Copyright Law sections in issue. Using resources or perhaps a crystal ball not available to the respondent, the petitioner states at page 23, "While this bill may expire following this Congressional Term, a follow-on bill will be presented in January of 1985". Unfortunately, the petitioner's gaze into the future does not contain a prediction that this Cochran bill will indeed ever become law or that it will be retroactive in effect.

An examination of this proposed bill reveals that it presents a proposed amendment to Clause 2 of Section 101, Title 17, which deals with works specially ordered or commissioned for use as part of motion pictures, etc. The bill in no way proposes an amendment to

subdivision 1 of Section 101, Title 17, which contains a definition of a"work made for hire".

The further proposed amendment to Section 201 of Title 17 cannot in any way be considered relevant to the issues at bar.

NO VALID REASONS ARE ADVANCED BY THE PETITIONER FOR GRANTING THE WRIT.

In addition to relying upon the "Cochran Bill S. 2138", the petitioner refers to the Restatement of Agency 2d §220 (1958) (A33-34) for the purpose of determining the issue attempted to be raised as a matter of law of what is an "employee" and what is an "independent contractor".

The petitioner's brief on page 29 limits the standards set forth in the Restatement of Agency in determining the difference between a servant and an independent contractor. The petitioner

omits as set forth on A-33 that in making a determination there must be considered as a matter of fact "(a) the extent of control which, by the agreement, the master may exercise over the details of the work;".

In addition, the petitioner omits the comment contained in the Restatement of Agency with reference to subdivision (1):

> "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

That comment, contained on page 486 of the Restatement reads in part as follows:

> "b. Non-contractual employment. The word "employed" as used in this Section is not intended to connote a contractual or business relation between the parties. ***"
>
> "c.***It cannot, however, be defined in general terms with substantial accuracy. The factors

stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation. See Comment g. If the inference is clear that there is, or is not a master and servant relation, it is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered." (487)

In the case at bar the jury has determined the question after appropriate instruction by the Court. The factual and legal issues have also been fully considered and reviewed by the Court below as well as the Circuit Court of Appeals.

The Petitioner merely relies on a footnote in the case of Taylor v. Local 7, International Union of Journeymen Horseshoers, 353 F2d 593 (4th Cir. 1965) in dealing with the issues of what is an independent contractor. If the petitioner were truly searching for the definition of an independent contractor as compared to an employee, the petitioner

could have referred this Court to the relevant portions of the opinion in the case itself instead of a footnote. In that case on page 596 the Court stated in part:

> "The usual test employed for determining whether one performing services for another is an independent contractor or an employee is found in the nature and the amount of control reserved by the person for whom the work is done."
>
> "The District Court recited certain facts upon which it based its conclusions with respect to the relationship between the owners and trainers and the farriers who served them. However, we think it necessary to consider the relevant attendant circumstances in their totality as clearly disclosed by the record. As this court stated in N.L.R.B. v. A.S. Abell Company, supra, 327 F.2d 1, 4 (4 Cir.1964), a case which arose under the National Relations Act:
>
> '* * *Thus, the critical distinction between an independent contractor and an employee is found in the nature and amount of control reserved by the person for whom the work is done. The test, however, admits much more readily of statement than of application. Resolution of the question must depend

> largely upon the peculiar facts of each case. Moreover, no single factor is controlling and the totality of the circumstances must be considered.'" (Emphasis supplied.)

It is submitted that the Circuit Court as well as the Court below followed the standards and rules set forth in the Taylor case opinion.

CONCLUSION

The petitioner does not satisfy any of the standards set forth in Rule 17 regarding review on certiorari. The defendant is a willful infringer who seeks to acquire a license to infringe by incomplete references to issues of fact as well as questions of law.

Petitioner's reliance upon a proposed Senate bill still in committee for over a year which may never see the light of day, is frivilous and warrants more than a denial of this petition for a writ.

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Respectfully submitted,

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